METAL RECLAMATION (INDUSTRIES) SDN BHD

v.

JRC TENAGA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD GHAZALI J
[COMPANIES (WINDING-UP) NO: D1-28-802-98]
2 FEBRUARY 2000

COMPANY LAW: *Winding up - Statutory demand - Whether statutory notice evidence of debt - Companies Act 1965, s. 218(2)(a)*

COMPANY LAW: *Winding up - Petition - Whether petition could be based purely on a s. 218(2)(a) notice of Companies Act 1965*

By a letter dated 23 June 1998, the petitioner sent to the respondent a notice of demand under s. 218(2)(a) of the Companies Act 1965 ('the Act'). The respondent failed to pay the debt demanded. The petitioner then presented a petition to wind up the respondent on the ground that having failed to comply with the statutory demand, the respondent was therefore deemed unable to pay its debts. As such, in the circumstances it was just and equitable that the respondent be wound up. The respondent opposed the petition claiming that the invoices and delivery orders exhibited were not clear evidence that the debt was owing. It was contended that a debt was only a debt if there was no dispute or there was a judgment.

Held:

[1] A statutory notice under s. 218(2)(a) of the Act cannot be said to be *prima facie* evidence of the debt. It is nothing more than a letter of demand sent to invoke the presumption of inability to pay debts and its function is to warn the debtor of an impending petition.

[2] A petitioner will still have to prove that it is a "creditor" and that the sum so stated in the notice is owing and due.

[3] Once a debt, not being a judgment debt, is disputed, a creditor has no right to petition and this is so even if the company is insolvent.

[4] A winding up petition is not a legitimate means of seeking to enforce a payment of debt which has not been clearly determined. Otherwise, the courts which hear winding up petitions would first have to establish the debt and this will put the courts to unnecessary strain if a petition to wind up is based not upon a judgment debt but purely on a s. 218(2)(a) notice.

Obiter:

Where a respondent applies to court for a stay of the winding up petition on the ground that it wishes to appeal against the finding of the court on the debt, the court cannot proceed to hear the winding up petition without giving the respondent an opportunity to appeal.

[Petition dismissed with costs.]

Case(s) referred to:
In re Ban Hong Co Ltd [1959] MLJ 100 ***(refd)***
Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd [1988] 3 MLJ 49 ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637 ***(refd)***
YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd [1996] 3 CLJ 51 ***(dist)***

Legislation referred to:
Companies Act 1965, s. 218, (1)(e), (2)(a)
Rules of the High Court 1980, O. 14, O. 18 r. 19

Other source(s) referred to:
Concise Law Dictionary, Osborn, 7th edn

For the petitioner - Colin Andrew Pereira; M/s KM Chye & Partners
For the respondent - Robyn Choi; M/s Raja, Darryl & Loh

Reported by AG Kalidas

JUDGMENT

Mohd Ghazali J:

On 2 October 1998 the petitioner filed this petition to wind-up the respondent. I had on 16 December 1999 dismissed the petition with costs and against that decision the petitioner has appealed to the Court of Appeal.

The petition show the respondent was incorporated on 27 April 1983 and its authorised capital is 20,000,000 ordinary shares of RM1 each and its paid up capital is RM4,500,000. It is alleged in the petition that the respondent is indebted to the petitioner in the sum of RM1,020,442-84 ('the said sum') being payment for goods sold and delivered.

It is not disputed that the petitioner's solicitors, Messrs KM Chye & Partners caused to be delivered by hand and by AR registered post a notice of demand pursuant to s. 218(2)(a) of the Companies Act 1965 ('the Act') dated 23 June 1998 to the respondent at its registered office. Pursuant to the said notice of demand, the respondent was required to pay the said sum within 21 days of receipt of the said notice of demand. The respondent did not do so. The said notice read:

Dear Sirs,

OUTSTANDING AMOUNT OF RM1,020,442-84

We act for Metal Reclamation (Industries) Sdn Bhd of Lot 17518, Taman Selayang Baru Industrial Estate, 8 1/2 Miles, Jalan Ipoh, 68100 Batu Caves, Selangor, Malaysia.

We refer to our letter dated 8 June 1998, a copy of which is enclosed.

As solicitors for our clients, WE HEREBY DEMAND the payment of the outstanding sum of RINGGIT MALAYSIA ONE MILLION TWENTY THOUSAND AND FOUR HUNDRED AND FORTY TWO AND SEN EIGHTY-FOUR (RM1,020,442-84) which is due and owing by you to our client, or to us as solicitors within twenty one (21) days of receipt of this letter. If you fail or neglect to pay the said sum or to secure or compound for it to the reasonable satisfaction of our client, we have further instructions to commence winding up proceedings under section 218 of the Companies Act, 1965.

Please note that this is a demand within the meaning of section 218(2)(a) of the Companies Act.

Yours faithfully,
(Sgd)
K M CHYE & PARTNERS
Kuala Lumpur

It is the petitioner's stand that since the respondent has failed and/or refused and/or neglected to pay any or all of the said sum, the respondent is therefore deemed to be unable to pay its debts and in the circumstances it is just and equitable that the respondent be wound up.

On 8 February 1999 the respondent filed a notice of intention to appear and to oppose the petition. It is illustrated therein that the respondent is in receivership. In its affidavit which was filed on 21 May 1999, the deponent, one Lim Tian Huat of Messrs Arthur Andersen & Co, state that he is a duly appointed receiver and manager of the respondent. He explained therein, *inter alia*, the following:

(1) that the respondent has obtained various banking facilities from Bank Kerjasama Rakyat (M) Berhad ('the bank') which were secured by four debentures all given in favour of the bank;

(2) events of default under the debentures have occurred enabling his appointment as the receiver and manager of the respondent;

(3) since his appointment, he instructed the respondent's solicitors to seek the consent of the petitioner in respect of the withdrawal of the proceedings herein;

(4) he is still in the process of verifying the liability of the respondent to the petitioner and the accuracy of the claims made therein and to date have not received a copy of the statement of affairs to be filed and submitted by the respondent's directors; further the claim by the petitioner for the goods in question has yet to be resolved to date;

(5) to the best of his knowledge the amounts owed to the bank to date is in excess of RM15 million;

(6) the bank, in the course of his appointment, agrees that the order for the winding up of the respondent would not be desirable nor beneficial in the interests of the respondent and its creditors, in particular secured creditors of the respondent, as a whole;

(7) in the event a forced sale of the assets of the respondent which are all secured in favour of the bank is effected in the near future, the bank will still suffer a shortfall in excess of RM7 million;

(8) neither the petitioner nor any of the creditors of the respondent would benefit from its winding up as it would entail a forced and prompt disposal of its assets without any opportunity to source the best potential and method for so doing;

(9) in the event the respondent is wound up, there would be even more difficulties encountered in the attempts taken to recover the debts owed to the respondent which based on his preliminary assessment is in excess of RM6 million;

(10) since the receivership, the respondent has taken various steps to recover the debts owed to it;

(11) the respondent has been progressively taking steps to recover debts in particular debtors which debts exceeds RM3.4 million who attempt to stall payment or avoid so doing in the hope that the respondent will be ordered to be wound up;

(12) in the event the respondent is compelled to wind down, it will be incapacitated from carrying on business;

(13) in the event he is able to continue to receive the assets and manage the respondent, he would be able to do so in the interests of the respondent as a whole and ascertain if the respondent is able to, *inter alia*, be taken over or sold off as a going concern;

(14) notwithstanding the current apparent insolvent position of the respondent, it is just and equitable in all circumstances of the case that the petition be dismissed as the same would carry a prejudicial stigma against the respondent and its assets and would hinder the course of the receivership or the realisation of its assets;

(15) in the light of the receivership of the respondent, there would be no prejudice to the petitioner if the petition is struck out as the petitioner would not as an unsecured creditor stand to receive and realise in priority to the bank.

In its affidavit in reply the petitioner exhibited the relevant invoices, delivery orders and a statement of account to show the amount owing by the respondent. The petitioner contended therein that the respondent has to date never disputed the amount owing and there is in fact no dispute as to the amount owing. The petitioner insist the delivery orders and invoices exhibited are clear evidence that the debt is due and owing and in the premise, there is no reason why the receiver should not be able to verify the accuracy of the claims. Furthermore, from the contents of the receiver's affidavit it is clear that the respondent is insolvent. The petitioner, in filing this petition, is merely enforcing its legal rights.

In reply the receiver, *inter alia*, contended 'the alleged debt herein relating to the goods in question are indeed severely disputed'.

At the hearing of the petition, counsel for the petitioner conceded that he has not obtained a judgment against the respondent for the sum claimed as stated in the notice issued pursuant to s. 218(2)(a) of the Act. Notwithstanding that, he argued the said notice is a statutory notice and is *prima facie* evidence of the debt. Counsel pointed out the first invoice exhibited in his affidavit in reply (encl. 11) show that for that particular order, the sum due from the respondent is RM26,121.70 and that sum by itself is sufficient to raise the presumption under s. 218(2)(a) of the Act. He argued the respondent never disputed this amount of RM26,121.70. He submitted the petitioner is a creditor and the company is clearly insolvent.

In opposing the petition, counsel for the respondent argued the debt is clearly disputed. The invoices and delivery orders exhibited are not clear evidence the debt is owing. The first invoice itself is disputed and there is a debit note. Furthermore, the invoices and delivery orders have not been fully explained in the petitioner's affidavit. He then contended a debt is only a debt if there is no dispute or there is a judgment. Using delivery orders cannot show the debt. There should be a judgment debt and without one, the petition should be dismissed with costs.

Section 218(1) of the Act provides the circumstances in which a company may be wound up by court and sub-s. (1)(e) of the same provides the court may order the winding up if 'the company is unable to pay its debts'. From my reading of the petition, this seem to be the only ground relied on by the petitioner for the winding up order. Section 218(2) of the Act provides for the 'definition of inability to pay debts' and it read –

> A company shall be deemed to be unable to pay its debts if –
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
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> (b) execution or other process issued on judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
>
> (c) it is proved to the satisfaction of the court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

What is a "creditor"? According to Osborn's *Concise Law Dictionary*, 7th edn, a "creditor" is "a person to whom a debt is owing". In the instant case, is the petitioner a creditor? To entitle the petitioner to call itself a creditor, there must be a debt owing from the respondent to the creditor. The petitioner has not obtained a judgment against the respondent for the sum claimed which would have clearly shown it is a creditor. That being the situation it has to show that there is a debt owing from the respondent to them. The debt must also be undisputed.

In the instant case, to support its stand that there is an undisputed debt, the petitioner has in its affidavit in reply (encl. 11) exhibited copies of a total of 31 invoices issued for goods ordered by the respondent between 23 July 1997 and 27 January 1998 and copies of a total of 36 delivery notes dated between 23 July 1997 and 26 January 1998. The delivery notes show that the goods ordered were supplied and received by the respondent. It was also endorsed by the respondent on each of the delivery note that receipt is subject to quality, quantity and price examination by the respondent. Whether any of the goods supplied were returned or rejected by the respondent has not been illustrated. The documents exhibited by the petitioner further show a debit note dated

23 September 1997 was issued to the respondent by the petitioner for the sum of RM89.89 being amount undercharged as per invoices stated therein and also show that a credit note dated 31 January 1998 was issued to the respondent by the petitioner for the sum of RM62.25 being amount overcharged in one of the invoices. A statement of account for the month ending 30 April 1998 relating the dealings between their goodselves and the respondent was also exhibited. On the face of it that statement of account illustrate the respondent has not paid the sum of RM1,020,442.84 as at the end of April 1998. This is the sum referred to in the said statutory notice. That statement of account also seem to illustrate that the respondent has not paid a single cent to the petitioner for the goods ordered and delivered.

From my reading of the invoices and delivery orders exhibited, it would seem that some of the goods were delivered not as per invoice, *viz*., the goods stated in a particular invoice were delivered separately. I have also noticed that the said statement of account has not taken into consideration the credit note issued for the sum of RM62.25 although the debit note amounting to RM89.89 was taken into account. Can it be safely said that the amount stated in the statutory notice is the debt actually owing by the respondent to the petitioner? Counsel for the petitioner argued the statutory notice is *prima facie* evidence of the debt. I cannot fathom that argument. That sum referred to in the notice is not a judgment sum. The omission to take into consideration the amount stated in the credit note, petty it may be, would clearly denote the amount stated in the notice is suspect. The receiver and manager of the respondent has contended in his affidavit that "the alleged debt herein relating to the goods in question are indeed severely disputed". Although he has not given details as to which part of the alleged debt is being "severely disputed", the situation is the respondent disputes the said sum demanded as stated in the statutory notice and as reflected in the petition. It would have been a different scenario altogether if the debt is undisputed or that the respondent admit that the debt is owing but then there is nothing to show that that is the situation.

In his submission counsel for the petitioner, as discussed earlier, insisted that the statutory notice is *prima facie* evidence of the debt. That notice, to me, is equivalent to a letter of demand and its function is to warn a debtor of an impending petition. Section 218(1)(e) of the Act provides the court may order a winding up if the company is unable to pay its debts and inability to pay is generally proved by service of a notice under s. 218(2)(a) or by other proof of insolvency. Section 218(2) provides for the definition of inability to pay debts and sub-s. (2)(a) of the same states a company shall be deemed to be unable to pay its debts if it as debtor does not pay within 21 days of service of the notice. From the failure of the company to pay as demanded, it is presumed that the company is unable to pay its debts. How that notice,

statutory it may be, can be said to be *prima facie* evidence of the debt escape me. It is nothing more than a letter of demand sent by solicitors for the petitioner to invoke the presumption of inability to pay debts. I would think that the petitioner would still have to prove that it is a creditor and that the sum so stated in the notice is owing and so due.

In my view the evidence do show that the petitioner is a creditor but then there is, to me, some doubt as to how much is really owing. Counsel for the petitioner argued that the first invoice exhibited by the petitioner show that for that particular order the sum due from the respondent is RM26,121.70 and that sum by itself is sufficient to raise the presumption under s. 218(2)(a) of the Act. He argued the respondent never disputed this amount of RM26,121.70. In *YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd* [1996] 2 MLJ 482, Ahmad Fairuz JCA held that the statutory presumption of insolvency arose as long as the undisputed sum claimed exceeded RM500. It was further held that failure to quantify interest was not fatal to the efficacy of the statutory demand. From my reading, that case can be distinguished from the instant case on the ground that in that case the petitioner had obtained a judgment debt prior to the winding up proceedings. I am of the view that once a debt, and not being a judgment debt at that, is disputed, a creditor has no right to petition and this is so even if the company is insolvent. In *Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49, the petitioner, a building contractor filed a petition to wind up the respondent, a housing developer as the latter failed to pay for the balance of the work that the petitioner had carried out for the respondent under an agreement together with interest. The respondent applied for an order to strike out the petition pursuant to O. 18 r. 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the court. In allowing the application, Zakaria Yatim J (as he then was) said (at p. 50):

> It is common ground that there is no judgment debt in the present case. The question for the court to consider is whether the petitioner is a creditor and the respondent is a debtor. A creditor is a person who could enforce his claim against the company by an action of debt and a person cannot petition as a creditor when he merely has a right of action against the company for unliquidated damages for breach of contract (see *Pennington's Company Law* (1985) 5th Ed p 843). Where a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a creditor (see *Re Lympne Investment Ltd* at p 389). If the petitioner is not a creditor, it is not entitled to present a petition or apply for a winding-up order. It has no *locus standi* and the petition must fail (see *Mann & Another v. Goldstein & Another* at p 771).

In the instant case, considering the circumstances discussed above, I would think that the proper course would be for the petitioner to commence an action to establish the debt due rather than a winding up petition. What is clear is the petitioner has based its petition on s. 218(1)(e) of the Act, *viz*., the court may order the winding up if the company is unable to pay its debts. To me the word "may" found in that subsection would clearly denote that the court has a discretion whether or not to wind up the company. The petitioner has sent what is commonly referred to as "a statutory notice" under s. 218(2)(a) of the Act. Counsel for the petitioner has argued that the notice sent by him pursuant to that provision is *prima facie* evidence of the debt. If that is a correct proposition of the law, I do not see the need for, for example, trade suppliers or even financial institutions to file civil suits against companies to recover unpaid debts or unpaid loans respectively and go through the hassle of an O. 14 application or a trial in order to obtain a judgment debt when all they need to do is to send a notice under s. 218(2)(a) of the Act and kill two birds with one stone.

The effect will be since the statutory notice is evidence of the debt, the company, if it does not want to face the consequences of a winding up, will be forced to pay up even if the accuracy of the debt is suspect. What is the function of the statutory notice under s. 218(2)(a) of the Act? In *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* [1992] 1 MLJ 313, 317 the court held its function is to warn the debtor of an impending petition. The notice must also relate to a specified debt whose amount or existence cannot be seriously questioned. Where the amount is questionable or suspect and there is no judgment sum to support it, the petition should be dismissed. In *In re Ban Hong Co Ltd* [1959] MLJ 100 it was held that a petition instituted for the purpose of enforcing a disputed debt is an abuse of process of the court and will be dismissed with costs. Rigby J said (at p. 103):

> It is well settled law that a winding-up petition is not to be used as machinery to try a common law action, and that the presentation of a petition for winding-up simply with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs.

I would agree with the views of Rigby J. A winding up petition is not a legitimate means of seeking to enforce payment of a debt which has not been clearly determined otherwise the courts, when faced with a winding-up petition on a debt which is not based upon a judgment debt, would first have to establish the debt due, *viz*., whether the alleged debt claimed is the actual amount owing based on the evidence available. The courts which hear winding up petitions will then be put to unnecessary strain if a petition to wind up is based not upon a judgment debt but purely on a s. 218(2)(a) notice. If the

debt stated in the notice is disputed, the court must, at the outset, proceed to hear the dispute on the debt first in order to determine the sum actually owing by the respondent to the petitioner. Only when the debt is determined can the court proceed to hear the winding up petition. Is this the proper course that the court should take when faced with such a situation? What if the respondent applies to court for a stay of the winding up petition at that stage on the ground that he wished to appeal against the finding of the court on the debt alone? For the court to proceed to hear the winding up petition without giving the respondent an opportunity to appeal on the finding of the court in relation to the debt would be unthinkable.

For the reasons stated above, I dismissed this petition with costs.